

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 RYAN PAYNE and VICTORIA SHARP, )

4 Plaintiffs, )

5 v. )

6 GREG T. BRETZING, DOES 1-12, )  
and OTHER MEN NAMES UNKNOWN, )

7 Defendants. )

Case No. 2:18-cv-00165-MO

September 6, 2019

Portland, Oregon

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15 Oral Argument

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MICHAEL W. MOSMAN

18 UNITED STATES DISTRICT COURT CHIEF JUDGE  
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APPEARANCES

FOR THE PLAINTIFFS: Mr. Roger I. Root (by telephone)  
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1 (P R O C E E D I N G S)

2 (September 6, 2019, 9:07 a.m.)

3 THE CLERK: We're here today for oral argument in  
4 Case No. 2:18-cv-165-MO, Payne, et al. v. Astarita, et al.

5 Counsel, please state your name for the record,  
6 starting with plaintiff.

7 MR. ROOTS: Roger Roots for Plaintiff Payne and  
8 Sharp.

9 MS. SILVER: Molly Silver on behalf of Harney County.

10 MS. TAYLOR: And Leah Brownlee Taylor on behalf of  
11 Defendants Greg Bretzing and the United States of America.

12 THE COURT: Ms. Silver, we could barely hear you, so  
13 please speak up next time you speak, if you do speak in this  
14 hearing.

15 MS. SILVER: Yes, Your Honor.

16 THE COURT: Mr. Roots, I'm surprised to learn you're  
17 appearing by phone. Did I get any notice of that from you in  
18 advance?

19 MR. ROOTS: No. I didn't know I needed to file any  
20 motion on that.

21 THE COURT: All right. Same request to you. Please  
22 speak up, because you're on speaker -- or because you're on the  
23 phone. It's not a great system here. Try to be as clear and  
24 as loud as you can to make sure you're heard for our purposes  
25 and for the court reporter.

1           A couple of housekeeping matters to start with.  
2       Plaintiffs have voluntarily dismissed certain named persons.  
3       Particularly that relates to Harney County and Oregon State,  
4       Oregon State Police and others. And it appears that the "other  
5       men" and the 1X to 12X or Doe defendants are related to the  
6       named defendants that have been voluntarily dismissed. In  
7       other words, that it appears plaintiff is not proceeding any  
8       longer against the "and other men" and Doe or 1X through 12X  
9       defendants. But I don't want to jump to any conclusions here.

10           Is that correct, Mr. Roots?

11           MR. ROOTS: No, that's not my understanding at all.  
12       We're still trying to get the names of those John Doe  
13       defendants and to file an amended complaint.

14           THE COURT: And are they Harney County and Oregon  
15       State defendants, or are they in some other category?

16           MR. ROOTS: I would almost -- I'm almost certain that  
17       few or none are Harney County. Several are certainly Oregon  
18       State Police.

19           THE COURT: All right. Thank you.

20           Let me give you my tentative thoughts in the order in  
21       which they were briefed, and then I'll hear any further  
22       argument you wish to make.

23           Mr. Bretzing has several theories supporting his  
24       motion to dismiss. The first theory I'll pick up is his theory  
25       that there is, under Rule 12(b)(6), a failure to state a *Bivens*

1 claim, and related to that is his theory of qualified immunity.  
2 I'll take both up at once.

3 For the failure to state a theory of relief here in  
4 his motion to dismiss, it turns on the concept that under a --  
5 that in a *Bivens* claim like this, plaintiff must allege  
6 Mr. Bretzing's own acts, not acts supervising other people.  
7 And it certainly appears that the -- both the complaint and  
8 plaintiffs' response here focus on supervisory acts by  
9 Mr. Bretzing, and so in that sense, they fail to state a claim  
10 under *Bivens*.

11 He also alleges -- again, under the 12(b) (6)  
12 theory -- that as formulated here, this would be a new  
13 variation of *Bivens*, requiring a special factors analysis, and  
14 that one of the things that special factors analysis tells me  
15 to look at is whether this *Bivens* action would focus on the  
16 individual acts of an officer that violate someone's  
17 constitutional rights -- that is, for example, failing --  
18 failing to provide medical care when needed or searching when  
19 you shouldn't search, that sort of thing, or does it implicate  
20 the implementation and formulation of policy decisions. And  
21 here it seems much more like the latter, and because that's the  
22 case, a significant number of cases say that *Bivens* shouldn't  
23 be extended into that sort of arena.

24 So those are the two 12(b) (6) theories, and related  
25 to that is his request for application of qualified immunity.

1 That's a little harder here because the first step in that  
2 analysis is was there a substantial right violated by  
3 Mr. Bretzing. And that, again, brings up the problem of here  
4 there's no direct acts of Mr. Bretzing that are implicated by  
5 the complaint or by the briefing. Instead, it's all  
6 supervisory. So to grant qualified immunity, I'd have to say,  
7 well, first, there's been nothing alleged that shows  
8 Mr. Bretzing directly violated a constitutional right, and I'm  
9 not going to try to imagine, you know, what might be alleged to  
10 do that. So it appears to me that you don't get out of the  
11 gate with qualified immunity, in part because you don't have an  
12 allegation that Mr. Bretzing violated a constitutional right.  
13 And that's all related to this idea that there's no allegations  
14 or briefing of Mr. Bretzing's own acts, as opposed to his  
15 supervision of others.

16 Now, I'm aware that in *Starr v. Baca* in the Ninth  
17 Circuit, consistent with other circuits, has made clear that  
18 deliberate indifference by a supervisor can amount to  
19 individual acts and individual liabilities. That's different,  
20 however, than just supervising others, and it doesn't seem to  
21 me that that's what's alleged here at all. It doesn't fit that  
22 narrow exception to the requirement that you allege, direct as  
23 opposed to supervisory action.

24 So let's start with the 12(b)(6) motion. I don't  
25 think we need to talk about qualified immunity much yet. And

1 I'll turn to you, Mr. Roots. What have you alleged that  
2 involves Mr. Bretzing's own actions as opposed to supervising  
3 others?

4 MR. ROOTS: Well, Count 2 is fairly broadly  
5 written --

6 THE COURT: Mr. Roots, I'm going to interrupt you  
7 now, because I can tell you that we're not going to be able to  
8 make a transcript of what you're saying at the rate we're  
9 going. I don't know if you're speaking into a speaker phone or  
10 not. Are you?

11 MR. ROOTS: No.

12 THE COURT: Then you'll have to speak far more loudly  
13 and far more clearly. This is precisely why, if you had filed  
14 a motion asking to appear by phone, I would have denied it.  
15 This is an important hearing, and right now your arguments are  
16 not even being noted, heard or recorded. So do your best.

17 MR. ROOTS: Well, Count 2 is very broadly written,  
18 and it does include Mr. Bretzing for a breach of duty to  
19 protect the constitutional rights of the plaintiffs. Count 3  
20 is a *Bivens* claim for excessive force, and I would say the  
21 complaint as written is quite similar to many other complaints,  
22 *Bivens* complaints.

23 THE COURT: So what excessive force did Mr. Bretzing  
24 employ against somebody, for example?

25 MR. ROOTS: Well, now, I would say the line here is

1 not as bright as it might seem. Mr. Bretzing was  
2 communicating, you know, on site. He was in active  
3 communication with all the other defendants in this case at the  
4 time. So he was -- he wasn't just supervising but directing  
5 some of these violations.

6 THE COURT: All right. Thank you.

7 MR. ROOTS: And, of course, failure to train. And  
8 that's laid out very similar to many other *Bivens* lawsuits for  
9 failure to train. I think all the elements are met there.

10 And finally, Count 5, violation of the right to  
11 travel, and Count 6 also include Mr. Bretzing. Count 6 is  
12 retaliation for First Amendment -- for people exercising their  
13 First Amendment rights. And I think these counts as written  
14 are very -- the complaint is not perfect, it was written by pro  
15 se litigants, but it certainly lays out the four corners that  
16 are required of a *Bivens* complaint.

17 Again, it's not so much a bright line of supervisory  
18 versus -- versus, you know, the people who actually fired the  
19 weapons or whatnot or displayed the weapon. Mr. Bretzing was  
20 in active control of the situation.

21 There's the line of cases about the policy arena.  
22 You know, that line of cases is very clear that policy  
23 supervisors, such as the secretary of -- you know, the  
24 secretary of the Department of Justice or the attorney general  
25 or someone in a policy position cannot be brought into a *Bivens*



1 claim in this way, but Mr. Bretzing was not that high a level.  
2 He was not a policy direct supervisor. He was a hands-on  
3 controlling supervisor.

4 THE COURT: Thank you.

5 Your argument repeats what your brief makes clear,  
6 and that is that this case involves Bretzing's supervision of  
7 others. The fact that he's directly there ordering people to  
8 go here or go there, that's what's meant by the term  
9 "supervision," and so it therefore fails to state a *Bivens*  
10 claim under 12(b)(6) by failing to allege Mr. Bretzing's own  
11 acts as opposed to his supervision of others. It does not  
12 remotely come within *Starr v. Baca*. It does raise the concerns  
13 in a new *Bivens* context under a special factors analysis that  
14 implicate the implementation of broad decisions as opposed to  
15 the direct actions that *Bivens* is intended to get at, and  
16 therefore I dismiss the complaint against Mr. Bretzing on Rule  
17 12(b)(6).

18 There is the question of qualified immunity. Step  
19 one in looking at qualified immunity is did Mr. Bretzing by his  
20 own acts violate someone's constitutional rights. And here no  
21 direct act of Mr. Bretzing's, as opposed to a supervisory act,  
22 violate anybody's constitutional rights. And for that reason,  
23 then, he is entitled to qualified immunity as far as that goes,  
24 although it's really fundamentally the same 12(b)(6) problem  
25 that results in a failure to state a claim.

1           And because we've now been around this a couple times  
2 and talked about it, and both in briefing and oral argument  
3 it's clear that plaintiff simply disagrees with this concept, I  
4 dismiss the complaint for these reasons with prejudice.

5           The complaint also seeks injunctive relief. And  
6 there are two problems with the injunctive relief sought. One  
7 is that in it's -- in an individual capacity against  
8 Mr. Bretzing, that can't be granted because he's now an  
9 ex-employee of the United States, and that is insuperable.  
10 There's no argument about that, and it just can't be done. So  
11 I dismiss all claims for injunctive relief against Mr. Bretzing  
12 in his individual capacity, since he can't play an official  
13 role anymore.

14           In his official capacity, plaintiff -- plaintiffs  
15 need to show some real or immediate threat of similar action  
16 occurring to them. The classic way that's done is, you know,  
17 that you complain that you got stopped unconstitutionally  
18 without probable cause by a policy that stops, say, black  
19 drivers in certain neighborhoods far more often than others,  
20 and you assert that it will happen again in the future because  
21 you're going to drive through the same neighborhood and you're  
22 a black driver, and the custom, practice or policy hasn't  
23 changed, so you're at risk to have it happen again. That's the  
24 sort of fact pattern that gets one injunctive relief in a case  
25 like this.

1           Here it's difficult to imagine how one would make a  
2 case that these similar actions would happen again, but I'll  
3 let you, Mr. Roots, make your best case for why your clients  
4 are under a real and immediate threat of similar action, in  
5 order to justify injunctive relief against Mr. Bretzing in his  
6 official capacity.

7           MR. ROOTS: With regard to the injunctive relief  
8 claim, I believe I've already waived those. We waived those.  
9 I believe I communicated with Ms. Taylor we're waiving that  
10 claim.

11           THE COURT: Then I grant the motion to dismiss that  
12 claim.

13           There is another theory that I should probably take  
14 up. Maybe I should have taken it up first, since it's  
15 jurisdictional, and that's insufficient service of process. So  
16 the law requires for someone -- for plaintiffs suing someone  
17 like Mr. Bretzing, that they serve him, which they successfully  
18 accomplished, but they must also serve the United States, even  
19 though he's an ex-employee. The advisory committee note to  
20 Rule 4I3 makes that clear.

21           Mr. Bretzing, in an improper, unsworn declaration,  
22 asserts that plaintiffs have not served the United States.  
23 Plaintiffs have never responded to that, but they've also not  
24 filed any proof of service against the United States.

25           So I'll just ask, Mr. Roots, with regard to this

1 complaint against Mr. Bretzing, did you ever successfully serve  
2 the United States with that complaint?

3 MR. ROOTS: I have to say my understanding is we did  
4 not.

5 THE COURT: All right. Then that's a further reason  
6 again -- as I say, maybe we're now getting to the cart, which  
7 should have come first before the horse and the other theories,  
8 and that's jurisdictional failure to serve the United States  
9 and justifying dismissal under 12(b)(6).

10 The United States has a theory for dismissal separate  
11 from Mr. Bretzing, and that's, of course, that the Federal Tort  
12 Claims Act for a case like this requires a written notice of  
13 the incident giving rise to the injury for which a federal  
14 agency may be held responsible to be sent to the United States  
15 or provided within the two -- required two-year period, and the  
16 United States in this case has provided a properly executed  
17 declaration that that never happened. If that never happened,  
18 then these tort claims -- which is what they are -- are barred  
19 under the FTCA.

20 So again, Mr. Roots, it appears that has never  
21 happened. The United States has asserted it's never happened.  
22 In your brief you don't assert otherwise. Is it true, then,  
23 that the FTCA tort claim notice was never provided within the  
24 required two-year period?

25 MR. ROOTS: My understanding from talking to Shawna

1 Cox, who was one of the original plaintiffs, Shawna Cox told me  
2 that she did send such a notice. And I've been in  
3 communication with her recently, and she indicated in the last  
4 two weeks that she was unable to find her paperwork. But she  
5 insists that she did file such a thing. I have not seen it.

6 THE COURT: I have before me, then, the United  
7 States' properly executed declaration that this has never  
8 happened. I have your brief in response, which never disputes  
9 that it didn't happen. And I have your assertion here today, a  
10 hearsay declaration of Ms. Cox that she says she did but can't  
11 find the paperwork.

12 I find in favor of the United States on that and rule  
13 that I lack jurisdiction for failure to provide the written  
14 notice within the required two-year time period, and dismiss  
15 with prejudice the claims against the United States.

16 That leaves us with claims against the other men and  
17 the Doe defendants. I'm first of all curious whether any of  
18 those are anything other than state law tort claims against  
19 state defendants.

20 Mr. Roots, do you know? Are these all going to be  
21 state tort claims against state defendants?

22 MR. ROOTS: No. Some of them are clearly identified  
23 as the FBI hostage rescue team.

24 THE COURT: I'm talking about the unnamed defendants.  
25 So in what way is an unnamed defendant clearly identified as

1 FBI?

2 MR. ROOTS: I'd say they're clearly identified by the  
3 known facts. We know there were two agencies at fault. There  
4 were several officers of the Oregon State Police, and there  
5 were also several officers of the FBI.

6 THE COURT: All right. Ms. Silver, are you on the  
7 line?

8 MR. ROOTS: I'm sorry?

9 THE COURT: I'm asking for Molly Silver. Is she on  
10 the line?

11 MS. SILVER: Yes, Your Honor.

12 THE COURT: Anything you want to say about in what  
13 manner this case moves forward against the and other men and  
14 Doe defendants?

15 MS. SILVER: We previously solicited dismissals as  
16 not involved in the case. At this point, proceeding forward,  
17 to the extent that Mr. Roots believes he still has any claims,  
18 we can raise motions to dismiss and --

19 THE COURT: I'm losing you now. Can you speak up?

20 MS. SILVER: Can you hear me now, Your Honor?

21 THE COURT: Yes.

22 MS. SILVER: At this time we are not moving to  
23 dismiss. We've been in discussions about dismissal, but given  
24 the procedural posture, we have concerns that claims might be  
25 improperly revived, and so it may be best to proceed in a

1 linear track. If any claims may arise throughout discovery, or  
2 putative claims, those can be addressed at that time.

3 THE COURT: Well, these are the only defendants left  
4 in the case, and you represent some or all of them, right?

5 MS. SILVER: We represent whatever ambiguous "and  
6 other men of Harney County." We don't represent anyone else of  
7 the state. I believe that would fall on state defense counsel.  
8 However, it's unclear to us who beyond the previously named  
9 Harney County defendants would remain, and so far, as you've  
10 heard, plaintiffs' counsel is unwilling to dismiss us. Moving  
11 forward with discovery is what we've planned to do, and being  
12 involved in that process.

13 THE COURT: Ms. Taylor.

14 MS. TAYLOR: Yes, Your Honor. Should I stand here --

15 THE COURT: You can sit there and pull the mic  
16 closer.

17 MS. TAYLOR: Thank you, Your Honor.

18 Thank you, Your Honor, for your cogent summary and  
19 analysis of Gregory Bretzing's defense and for your ruling.

20 On behalf of the United States, with respect to the  
21 Doe defendants that have been unnamed and unidentified by  
22 plaintiffs' counsel, I will say that with respect to any  
23 federal employees who are acting within the scope of their  
24 employment, that the U.S. may or may not be substituted for on  
25 state tort claims, Mr. Roots has already acknowledged that

1 there has been no Form 95 administrative claim that's been  
2 presented to the United States with respect to this incident  
3 that's the subject of the complaint, so it would be futile for  
4 the plaintiffs to amend their complaint to identify named  
5 federal employees for state tort claims for that very reason.

6 As to the *Bivens* claims, I only represent Gregory  
7 Bretzing and cannot make any arguments on behalf of any  
8 putative defendants that have been unidentified. But I will  
9 state this on behalf of the United States: Doe pleadings are  
10 highly disfavored in the Ninth Circuit, as I'm sure the Court  
11 is aware. This case has been languishing for years. There  
12 have been a number of full-blown criminal trials where  
13 witnesses have testified, including witnesses from the hostage  
14 rescue team. We have already made arguments before the Court  
15 that this complaint, to correct the complaint is time barred,  
16 does not relate back, but at this late stage for the Court to  
17 allow some amendment that would identify federal employees,  
18 whom plaintiffs' counsel had sufficient time and knowledge and  
19 notice of who they were, it would simply be futile under Rule  
20 15. And there's certainly case law in the Ninth Circuit and in  
21 the District of Oregon that would support the proposition that  
22 at this late stage of the pleadings, that an amended complaint  
23 naming and identifying the defendants should not take place.

24 THE COURT: I did neglect to take up your relation  
25 back argument. And your theory there is that the Cox



1 complaint, filed on the last possible day and subsequently  
2 withdrawn, can't be this complaint, and any iteration cannot  
3 relate back to it since Cox cannot have represented in any way  
4 Payne or Sharp, and therefore this complaint in its entirety is  
5 time barred. That's your theory, right?

6 MS. TAYLOR: That is our position. When Ms. Cox  
7 voluntarily dismissed this case, it operated under Rule 41 to  
8 dismiss the action. We understand that there was a corrected  
9 complaint that was filed, but that corrected complaint naming  
10 new plaintiffs was filed after the statute of limitations  
11 expired, so there was no service on any individual within the  
12 90-day time period under Rule 4(m), and it cannot relate back  
13 under Rule 14 to the original complaint, which was filed by  
14 another plaintiff, not the plaintiffs in this case.

15 THE COURT: Thank you.

16 Mr. Roots, do you wish to be heard any further on  
17 this question?

18 MR. ROOTS: Yes. I would say the Court's own orders  
19 have already addressed this very issue. You know, not to go  
20 back in all this litigation, but the original complaint had  
21 flaws on it. There were some signatures that were missing.  
22 The Court gave leave to fix that problem and correct that  
23 problem, and that problem was fixed by October of last year.  
24 And so the case has been fully -- it was never without -- the  
25 case has never been out of court during that time for Mr. Payne

1 and Mr. -- Ms. Sharp. They have been plaintiffs all along.

2 And with regard to whether a complaint relates back  
3 to the original date of filing, I'd say there's a lot of case  
4 law, including the original *Bivens* case. The original *Bivens*  
5 case did not know a single name of any of the defendants. And  
6 so that's the position I guess we're in right now at this  
7 moment.

8 Obviously, there have been some leaks and some names  
9 have gotten out, but when I filed a motion to file an amended  
10 complaint, the State moved in and argued that it all needed to  
11 be sealed and that these defendants are in fear for their lives  
12 and can't be named, which would be highly unusual. And so I  
13 think it is still a live case with these John Doe defendants  
14 representing Oregon State Police and the FBI.

15 MS. TAYLOR: May I respond, Your Honor?

16 THE COURT: That's all right. Thank you.

17 This case has been languishing in the face of  
18 plentiful opportunities to be more specific, so I agree that  
19 it's time to put a fork in this case.

20 In the face of a murky situation in the beginning, I  
21 declined to rule on the question of relation back without  
22 allowing the case first to proceed forward in a variety of  
23 ways, in the hopes of straightening out that situation. We now  
24 know better than before what really happened back then, and it  
25 is my ruling that the current complaint is barred by the

1 statute of limitations filed after the last day it could have  
2 been filed, and does not relate back to the Cox complaint,  
3 which does not -- did not contain these two plaintiffs here  
4 before me today, cannot have contained them, since Ms. Cox was  
5 unrepresented and could not represent Payne and Sharp, and  
6 their own complaint came too late, past the last point at which  
7 the statute had run. And therefore I dismiss the complaint  
8 against all remaining defendants for statute of limitations  
9 reasons.

10           It's also true, as Ms. Taylor has pointed out, that  
11 the same problem with the FTCA tort claims notice with named  
12 federal defendants would apply with equal force to currently  
13 unnamed federal defendants, and prevent any state tort claims  
14 being made against them, and there are -- there is not the  
15 supervisory issue but the new *Bivens* context issue at least  
16 with some potential as yet unidentified federal *Bivens*  
17 defendants.

18           So there are sort of a cascading series of reasons  
19 why the case should not go forward. Of course, the principal  
20 one as to the unnamed defendants is the non-relation back  
21 statute of limitations problem. And therefore I dismiss the  
22 complaint on that ground also as to all named defendants with  
23 prejudice.

24           Thank you all. We'll be in recess.

25           MS. TAYLOR: Thank you.

1 THE CLERK: Court is in recess.

2 (Proceedings concluded at 9:37 a.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

*/s/Bonita J. Shumway*

*September 23, 2019*

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE